

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

---

Trademark Trial and Appeal Board

---

Stratosphere Skateboards, Inc.

v.

Stratosphere Corporation

---

Opposition No. 95,975  
to application Serial No. 74/411,666  
filed on July 9, 1993

---

Virginia S. Taylor of Kilpatrick & Cody for Stratosphere  
Skateboards, Inc.

Edward J. Quirk of Quirk & Tratos for Stratosphere  
Corporation.

---

Before Hanak, Walters and Bucher, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Stratosphere Corp. (applicant) seeks to register  
STRATOSPHERE TOWER in typed capital letters for "clothing,  
namely shirts, pants, shorts, jackets and hats." The  
intent-to-use application was filed on July 9, 1993.

On December 30, 1994 Stratosphere Skateboards, Inc.  
(opposer) filed a notice of opposition alleging that long

**Opposition No. 95,975**

prior to July 9, 1993, it used STRATOSPHERE as both a service mark and a trademark in connection with the sale of various items of apparel including shirts, pants, shorts, and hats. Opposer also stated that it owned Registration No. 1,666,157 for the mark STRATOSPHERE depicted in typed capital letters. Opposer further noted that the services of this registration include "retail store services in the fields of ... sportswear for men, women and children, namely, shoes, socks, pants, shirts, shorts, jackets, swimsuits and hats." This registration issued on November 26, 1991 with a claimed first use date of March 1, 1986. Finally, opposer alleged that "applicant's use and registration of the mark STRATOSPHERE TOWER for apparel is likely to cause confusion with opposer's previously used mark STRATOSHPERE and opposer is likely to be injured thereby."

Applicant filed an answer which denied the pertinent allegations of the notice of opposition.

The record in this case includes the depositions of Thomas F. Taylor (applicant's president) and Andrew S. Blumen (opposer's executive vice president and general counsel). In addition, opposer properly made of record certified status and title copies of its aforementioned Registration No. 1,666,157.

Opposer filed a brief. Applicant did not. Neither party requested a hearing.

At the outset, we note that as to opposer's retail store services featuring, among other things, the sale of apparel, priority is not an issue in this proceeding because opposer has made of record its Registration No. 1,666,157. See King Candy v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). Moreover, the record establishes that opposer has operated a retail store selling, among other items, apparel continuously since 1986. In addition, since at least as early as 1987, opposer has made continuous trademark use of its mark STRATOSPHERE by affixing it to shirts and jackets. Furthermore, continuously since 1988 opposer has made trademark use of its mark STRATOSPHERE by affixing it to hats.

In any likelihood of confusion analysis, two key considerations are the similarities of the goods and/or services and the similarities of the marks. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Considering first the goods, we note that they are in part identical and otherwise very closely related. As just discussed, applicant has proven that long prior to 1993, it made continuous trademark use of its mark STRATOSPHERE in connection with shirts, jackets and hats, three of the five types of apparel for which applicant seeks to register STRATOSPHERE TOWER.

Turning to a consideration of the marks, two important legal propositions must be kept in mind. First, "when marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Second, because applicant seeks to register STRATOSPHERE TOWER in typed drawing form, this means that applicant's rights in the mark would "not [be] limited to the mark depicted in any special form." Phillips Petroleum v. C. J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Accordingly, in any likelihood of confusion analysis, we "must consider all reasonable manners in which [applicant's mark STRATOSPHERE TOWER] could be depicted" INB National Bank v. Metrohost, 22 USPQ2d 1585, 1588 (TTAB 1992).

Applying these two legal propositions to the facts of this case, we find that opposer's mark STRATOSPHERE and applicant's mark STRATOSPHERE TOWER are similar enough in visual appearance, pronunciation and connotation such that their use on legally identical goods is likely to result in confusion. This would be true even if applicant depicted both words of its mark in lettering of approximately the same size.

However, because applicant is seeking a typed drawing registration for STRATOSPHERE TOWER, were applicant to obtain such a registration, it would be free to depict its mark with the word STRATOSPHERE in large lettering and the word TOWER in smaller lettering. When so depicted, the similarities between applicant's mark and opposer's mark would be even greater. We note that Mr. Blumen (applicant's executive vice president and general counsel), would on numerous occasions abbreviate applicant's full corporate name to simply "Stratosphere." Moreover, Mr. Blumen often referred to applicant's planned resort complex in Las Vegas, Nevada as simply "the Stratosphere" or "the Stratosphere resort" without using its full name "the Stratosphere Tower." See, for example, Blumen deposition page 23. Finally, in discussing some prototype apparel items which applicant was developing, Mr. Blumen testified that these items simply say "Stratosphere Las Vegas" and that he could not "recall specifically any [apparel items] that say Stratosphere Tower." (Blumen deposition page 31). Thus, Mr. Blumen's own testimony only lends further support to the obvious proposition, namely, that one very reasonable manner of presentation of applicant's mark STRATOSPHERE TOWER would be to depict the word STRATOSPHERE in large lettering and the word TOWER in small lettering.

**Opposition No. 95,975**

Decision: The opposition is sustained.

E. W. Hanak

C. E. Walters

D. E. Bucher  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board